

use of the words "and of electricity supply and the metering thereof" immediately after the words "water mains" must in my opinion mean that under the agreement the society is also responsible for paying the cost of laying electric wires along the roads leading to these houses.

Giving clause 8 this construction does not in my opinion do violence to its language, for the transaction between the society and developer is an unusual one. The society is not like an ordinary purchaser who buys a single house; on the contrary it bought in bulk and in the circumstances it is not altogether unexpected that the agreement is so worded as to make the cost of these disputed items the society's responsibility rather than the developer's.

I would therefore dismiss this appeal with costs.

Lee Hun Hoe C.J. (Borneo) and Wan Suleiman F.J. concurred.

Appeal dismissed.

Solicitors: *Rithauddeen & Aziz; Shearn Delamore & Co.*

BEE CHUAN RUBBER FACTORY SDN. BHD. v. LOO SAM MOI

[F.C. (Gill C.J. (Malaya), Ong Hock Sim and Raja Azlan Shah F.J.J.) March 11, 1976]

[Kuala Lumpur — Federal Court Civil Appeal No. 125 of 1975]

Contract — Building contract — Whether time essence of contract — Damages for delay in completion of building — Counterclaim — Courts.

This was an appeal from the decision of Wan Suleiman F.J. The action arose out of an agreement in writing whereby the appellants agreed to sell to the respondent a piece of land in Seremban and to build for her a house thereon. There was delay in the completion of the contract and the learned trial judge found that the parties had by their conduct allowed the date for completion to pass. However the respondent had by letter dated August 21, 1970 given the appellants one month to carry out the contract. The learned trial judge held that this letter made time again the essence of the contract and as the respondent was not given possession of the house till April 4, 1975 he gave judgment for the respondent for damages at the rate of \$100 a month from September 21, 1970 to April 3, 1975. The learned judge who allowed part of the appellant's counterclaim that is for \$850 for extra work gave costs to them on the counterclaim. The appellants appealed and the respondent cross-appealed on the costs awarded on the counterclaim.

Held, dismissing the appeal and cross-appeal: (1) the learned trial judge was correct in giving judgment for damages for the respondent;

(2) Damages recoverable for breach of contract for delay in the completion of an ordinary dwelling house required for personal occupation, include the reasonable cost of living accommodation or living elsewhere if such expenses were in fact incurred. In the present case the respondent gave evidence which was not challenged that she paid rent at \$100 for her living accommodation. The learned judge was therefore quite right in awarding her damages at \$100 per mensem for the relevant period;

(3) as the appellants were partially successful on the counterclaim, the court would not interfere with the learned judge's order as to costs on the counterclaim.

Cases referred to:-

(1) *Wong Kup Sing v. Jeram Rubber Estates Ltd.* [1969] 1 M.L.J. 245.

- (2) *Ismail bin Haji Embong v. Lau Kong Han* [1970] 2 M.L.J. 213.
(3) *Koh Shey Guan v. Lee Kok Chan* [1971] 1 M.L.J. 79.
(4) *Haji Hasnan v. Tan Ah Kian* [1963] M.L.J. 175.
(5) *Hadley v. Baxendale* (1854) 9 Exch. 341.
(6) *Bow v. McGrath Builders* [1974] N.Z.L.R. 442.

FEDERAL COURT.

S. Periasamy for the appellants.

Gurdial Bakan Singh for the respondent.

Gill C.J. (Malaya) (delivering the judgment of the Court): This was an appeal by the defendants in the action from the judgment of Wan Suleiman F.J. sitting as a High Court Judge, and there was a cross-appeal by the respondent, plaintiff in the action.

The action arose out of an agreement in writing whereby the defendants agreed to sell to the plaintiff a piece of land in Seremban for \$4,000 and to build for her a house thereon for the price of \$12,500.

As provided in the agreement, the plaintiff paid \$3,000 on the date of the agreement. As to the balance of the purchase price for the land and the house, the defendants undertook to obtain for the plaintiff a loan of \$10,500 from the Malaya Borneo Building Society, Kuala Lumpur, and the plaintiff was to pay the remaining \$3,000 by two instalments of \$1,500 each, the first to be paid when the foundation for the construction of the house was made and the second when the house reached roof level.

It was also agreed between the parties that upon the title to the land being issued by the appropriate authority, the defendants would execute a transfer of the land in favour of the plaintiff who would then execute a charge over the land in favour of the society and authorise the society to pay the loan amount to the defendants. The plaintiff created a charge in favour of the society on June 23, 1969 and authorised the payment of the amount of the loan to the defendants.

By mutual agreement between the parties the method of payment by the plaintiff of the sum of \$3,000 by instalments was varied. The result of the variation was that the plaintiff paid \$500 on December 2, 1968, \$500 on December 19, 1968, \$500 on January 13, 1969, \$1,000 on April 24, 1969 and \$500 on August 4, 1969.

By clause 5 of the agreement, it was expressly agreed that the house shall be completed and certified fit for occupation and possession by the plaintiff on June 15, 1968. Clause 12 of the agreement stipulated that time shall be of the essence of the contract. By a letter dated December 24, 1968, which was more than 6 months after the agreed date of the handing over of the completed house to her, the plaintiff asked the defendants to make what she called a minor amendment to the building plan of the house. The amended plan was approved only on May 6, 1969.

The building reached roof level in April 1969 by which time, as stated earlier, the plaintiff had paid only \$1,500 so that there was still a balance of \$1,500 to be paid. When asked to pay this sum she asked for time, and, as I have stated earlier, this sum was

paid by two instalments of \$1,000 and \$500 on April 24, 1969 and on August 4, 1969 respectively. A

Although the house was completed soon after April 1969 the certificate of fitness was not issued until March 23, 1973. The delay for the obtaining of the fitness certificate arose because of the defendants' dispute with the Public Works Department over their contribution towards the cost of connecting the water supply to the housing estate in which the house for the plaintiff was situated. B

The plaintiff issued her writ in the action on November 6, 1970 claiming specific performance of the agreement and damages at the rate of \$100 per month from the agreed date of completion of the house until possession of the house was given to her, being the amount of rent which she had to pay for her living accommodation elsewhere. She also claimed interest at 6% per annum on the deposit sum of \$3,000 from June 16, 1968 to the date when the defendants were in a position to put her into occupation of the house, as provided in clause 6 of the agreement. C

In their statement of defence the defendants stated as follows. The construction of the house under the terms of the agreement was subject to the approval of the Town Council and the original plan was not approved until November 19, 1968. The date of completion in the agreement was a mistake and should have read June 15, 1969. They were unable to build the house because of the plaintiff's request for amendment to the original plan which was not approved until May 6, 1969. They completed the house as early as December 1969 but were kept waiting for the water supply which stood in the way of their getting a certificate of fitness for the house. Although time was stipulated in the agreement to be of the essence of the contract, the real intention of the parties was that the house would be completed as soon as it was practically possible after the approval of the plan. The plaintiff committed breach of her obligation under the terms of the agreement to pay the House Plan Fee, the Reinforced Concrete fee and the Architect's fee amounting to \$1,200 and for the extra work done under the amended plan amounting to \$850. They thus counterclaimed for that sum of \$2,050. D

At the trial of the action the managing director, Gan Kay Beng, conceded that there was no mistake about the agreed date of completion and the handing over of possession. As regards the plaintiff's claim for interest on the initial payment of \$3,000 for the late completion of the house, he said that the plaintiff had agreed to waive it because she in turn had not paid a similar sum as agreed and was given time to pay. E

As regards the counterclaim the plaintiff's evidence was that the defendants did not ask her for additional payment for the alterations which she had made to the plan, saying that it was a very small matter as it involved only the shifting forward of one wall which had not been built when she made the request for the alterations. However, her counsel informed the court that she was prepared to pay the additional sum of \$850 for the extra work done, and the money had in fact been paid. F

With regard to the architect's fees etc. the plaintiff's evidence was that the price of \$16,500 for the house included everything. The defendants' managing director, on the other hand, maintained that the plaintiff had agreed some time in 1968 to pay the architect's and reinforced concrete fees totalling \$1,200. The learned judge rejected this part of the defendants' counterclaim because he found it difficult to believe that the clause binding the purchasers of houses to pay relatively substantial sums of money for the house plan and other fees should be omitted in the entire set of agreements relating to the houses in the housing estate, especially when they were prepared by an advocate and solicitor, and he went on to hold that it was not the failure to pay these fees which caused the defendants to refuse to hand over the keys after the belated receipt of the certificate of fitness. G

As regards the question of time being of the essence of the contract, the learned trial judge agreed with the submission of defendants' counsel that here, as in the case of *Wong Kup Sing v. Jeram Rubber Estates Ltd.*⁽¹⁾ and *Ismail bin Haji Embong v. Lau Kong Han*,⁽²⁾ by the conduct of the parties the original date for completion had been allowed to pass with every show of acquiescence by the plaintiff. H

The plaintiff by her solicitor's letter dated August 21, 1970, gave the defendants one month from the date of the letter "to carry out the said contract" by putting her in possession. The learned judge took the view that this letter made time again the essence of the contract and gave the defendants reasonable time. For this he relied on *Koh Shey Guan v. Lee Kok Chan*⁽³⁾ and *Haji Hasnan v. Tan Ah Kian*.⁽⁴⁾ I

In the result the learned judge found that the defendant's inability to comply with the plaintiff's notice had nothing to do with her refusal to pay the architect's fees etc. and for the work done but was due entirely to their failure to pay the Public Works Department their contribution towards the cost of connecting the water supply. J

The keys to the house to enable the plaintiff to go into occupation of the house were delivered on April 4, 1975. The learned judge therefore gave judgment for the plaintiff for damages at the rate of \$100 a month from September 21, 1970 to April 3, 1975 and costs. In view of the defendants' partial success as regards the counterclaim in respect of cost of the extra work, he gave costs to the defendants on the counterclaim. K

It was contended in support of the defendants' appeal to this court that the learned judge should have found as a fact that the payment of \$850 by the plaintiff to the defendants was a condition precedent to the handing over of the house keys to the plaintiff. We did not think there was any merit in this contention, because there was no evidence of any agreement between the parties to that effect. Assuming that the plaintiff was liable to pay this sum of \$850, as found by the learned judge, the defendants were not justified on that ground alone to withhold possession. Any builder refusing to deliver occupation on the ground of non-payment of a paltry sum of \$850 would do so at his own peril in the face of a likely claim by the purchaser in respect of damages. L

for withholding possession. In any event, as the learned trial judge found, the non-payment by the plaintiff of this sum of \$850 had nothing whatever to do with the failure on the part of the defendants to deliver the house to the plaintiff. The truth was that they were unable to get a certificate of fitness solely because of their dispute with the Public Works Department as regards payment for the connection of the water supply.

The other ground of appeal was that the learned judge was wrong in awarding damages at \$100 per mensem when the plaintiff had agreed that damages should be only by way of interest at the rate of 6% per annum. A short answer to that ground is that the payment of interest 6% in the agreement was to be calculated on the amount of the initial deposit for the purchase of the land and the house. That indeed was part of the plaintiff's claim, but the learned judge disallowed it because the plaintiff herself had been given time to pay the other sum of \$3,000 under the agreement.

In our judgment, damages recoverable for breach of contract for delay in the completion of an ordinary dwelling house required for personal occupation, within the first branch of the rule in *Hadley v. Baxendale*,⁽⁵⁾ include the reasonable cost of living accommodation or living elsewhere and storing furniture, etc. if such expenses were in fact incurred. (See *Bow v. McGrath Builders*).⁽⁶⁾ In the present case the plaintiff gave evidence that she paid rent at \$100 a month for her living accommodation. That evidence was not challenged. The learned judge was therefore quite right in awarding her damages at \$100 per mensem for the relevant period.

The plaintiff's cross-appeal was in relation to the costs ordered against her on the counterclaim. It was contended that this sum of \$850 was due to be paid only when the keys of the house were handed to her. We did not think there was any agreement between the parties as to when this sum of \$850 was to be paid, but clearly it should have been paid when the house was completed, especially when the plaintiff herself had claimed damages at the rate of \$100 a month from the date of completion to the date of delivery of possession. As the defendants were partially successful on their counterclaim, we decided not to interfere with the learned judge's order as to costs on the counterclaim.

In the result we dismissed the appeal and the cross-appeal and made no order as to costs.

Appeal dismissed.

Solicitors: *Nahappan, Muthu & Peri; Gurdial Bakan Singh.*

A LEE MUN FOONG v. PUBLIC PROSECUTOR

[F.C. (Suffian L.P., Lee Hun Hoe C.J. (Borneo) and Wan Suleiman F.J.) March 6, 1976]

[Kuala Lumpur — Federal Court Criminal Reference No. 2 of 1975]

Criminal Law and Procedure — Prevention of corruption — Money offered as bribe — Additional penalty to be paid — Whether applicable only where money subject matter of offence has not been recovered — Prevention of Corruption Act, 1961, ss. 13 and 30 — Criminal Procedure Code (F.M.S. Cap. 6), ss. 283 and 407.

Bribery and Corruption — Money offered as bribe — Additional penalty — Whether payable only where bribe has not been recovered.

In this case the appellant had been convicted under section 4(a) of the Prevention of Corruption Act, 1961 and sentenced to 2 years imprisonment. The gratification of \$1,000 in this case has been handed to and accepted by the appellant in the course of a trap set by officers of the Anti-Corruption Agency and the money was recovered upon the appellant's arrest. On appeal an additional penalty of \$1,000 was imposed on the appellant by the appellate court. The learned judge then reserved the following question for the Federal Court — "Whether the provisions of section 13 of the Prevention of Corruption Act, 1961, are applicable in every case of a conviction under the said Act or whether the application of section 13 is restricted only to instances where the money the subject-matter of the offence has not been recovered."

Held: the provisions of section 13 of the Prevention of Corruption Act, 1961, are applicable in every case of a conviction under the said Act and not restricted only to instances where the money and indeed any other form of gratification, the subject matter of the offence, has not been recovered.

Cases referred to:-

- (1) *Mohamed bin Long v. Public Prosecutor* [1972] 1 M.L.J. 76.
- (2) *Mahesan v. Public Prosecutor* [1970] 1 M.L.J. 255.
- (3) *M. Gangatheram v. Public Prosecutor Perak Criminal Appeal No. 25 of 1973.*
- (4) *Reading v. Attorney-General* [1951] A.C. 507.

FEDERAL COURT CRIMINAL REFERENCE.

Paramjit Singh for the applicant.

Mohtar bin Abdullah (Deputy Public Prosecutor) for the respondent.

In the High Court the following judgment was delivered on June 2, 1975:

Abdoolcader J.: The appellant was found guilty and convicted in the Special Sessions Court at Ipoh on August 17, 1972, on the following amended charge:

"That you on March 2, 1972 at about 8.45 p.m. at house No. 52, Main Road, Siputeh, in the District of Kinta, in the State of Perak, being an agent of the Government of Malaysia, namely, an Assistant Examiner attached to the Inland Revenue Department, Ipoh, did corruptly obtain a gratification for yourself, to wit, cash \$1,000 from one Wong On of No. 52, Main Road, Siputeh, as an inducement for showing a favour in relation to your principal's affairs, to wit, to prepare the accounts of the said Wong On so that less income tax was to be paid pertaining to the income tax returns of the said Wong On for years of assessments from 1966 to 1971 and that you thereby committed an offence punishable under section 4(a) of the Prevention of Corruption Act, 1961 (Laws of Malaysia Act, 1957 Revised — 1971)"

and was sentenced to 2 years imprisonment.

His appeal against conviction and sentence was dismissed by me on April 1, 1975, and on the Deputy Public Prosecutor drawing my attention to the provisions of section 13 of the Prevention of Corruption Act, 1961, and the rectification by the Federal Court